No. 4082 AT LAW.

In the United States Circuit Court of Appeals

For the Ninth Circuit

THE UNITED STATES OF AMERICA, *ex rel.* THOMAS W. MILLER, Alien Property Custodian of the United States of America,
Plaintiff and Relator in Error,

v.

CLIFFORD L. BABCOCK, State Treasurer of the State of Washington,
Defendant and Respondent in Error.

UPON WRIT OF ERROR TO THE UNITED STATES DISTRICT COURT, WESTERN DISTRICT OF WASHINGTON, SOUTHERN DIVISION.

HONORABLE EDWARD E. CUSHMAN, *Judge Presiding.*

BRIEF FOR DEFENDANT AND RESPONDENT IN ERROR

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Defendant and Respondent in Error.

Upon Writ of Error to the United States District Court, Western District of Washington, Southern Division.

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STATEMENT OF THE CASE.

The facts in this case are not in dispute, as the real issue was raised by demurrer and we will not again state the facts which are outlined in plaintiff's brief.

ARGUMENT.

The controlling issue in this case is: Has the District Court jurisdiction of an action against the state by virtue of the Trading with the Enemy Act, which was originally enacted October 6, 1917, (ch. 106, 40 Stat. at L., 411)?

This issue resolves itself into the question of whether or not section 17 of the Trading with the Enemy Act, 1918 Supp. Fed. Stat. Ann., page 865, repeals by implication section 233 of the Judicial Code.

I.

This is an Action Against the State.

We think it is practically conceded in plaintiff's brief that this is an action against the state, but in any event, we desire to call the court's attention to a few authorities on this question which we deem controlling.

In the case of *Clifford v. Miller,* 288 Fed. 537, an action was instituted by the Alien Property Custodian to reduce to possession certain warrants held by the Department of Labor and Industries, and in holding that such an action was not an action against the state, the court, in distinguishing the case of *Lankford v. Platte Iron Works,* 235 U. S. 461, said:

"No relief whatever is sought against the state and no attempt is made to control the discretion of its executive officers or to administer funds in the public treasury. In this respect the case differs

widely from *Lankford v. Platte Iron Works,* 235 U. S. 461, 35 Sup. Ct. 173, 59 Law Ed. 316, and kindred cases cited by the appellants. In the *Lankford* case the court awarded a money judgment to the plaintiff and decreed that it was entitled to have the same paid out of the depositors' guaranty fund created under and by virtue of the laws of the State of Oklahoma. Had the appellee here sought the same measure of relief, there would be some analogy between the two cases. But, as already stated, neither the state nor its funds are affected by the decree in the remotest way, and no attempt is made to control the judgment or discretion of state officers."

Inasmuch as this is an action to compel the State Treasurer to pay out of the State Treasury state funds, it is submitted that the case quoted, *supra,* holds squarely that the present action is an action against the state.

In the case of *Lankford v. Platte Iron Works,* 235 U. S. 461, 59 Law Ed. 316, it appears that an action was instituted by the appellee against the Oklahoma State Banking Board and J. D. Lankford, the State Bank Commissioner. It appears that the appellee was the holder of two certain time certificates of deposit issued by a certain bank. Subsequently, the Bank Commissioner took charge of the bank and all of its assets, and proceeded to wind up its affairs. Demand was made for the payment of the certificates upon the Banking Board, and the Commissioner, out of the depositors' guaranty fund of the state, but payment was refused. The banking law of the State of Oklahoma provided that if there should be not

sufficient funds available for the purpose of paying depositors of a defunct bank, that the Banking Board should be required to issue certain certificates of indebtedness for the amount of the deposit, to be known as depositors' guaranty fund warrants of the State of Oklahoma, and that the Banking Board should be required to levy an assessment against the capital stock of each and every stock company organized and existing under the laws of Oklahoma for the purpose of increasing such depositors' guaranty fund and pay the depositors and the depositors' guaranty fund warrants of the State of Oklahoma. It was contended on behalf of the appellant that this was a suit against the state and that the appellants had no personal interest therein and were being sued in their official capacity as agents of the state. On behalf of the appellee it was urged that this was not an action against the state because an action against a state officer to compel him to perform duties prescribed by law is not an action against the state, and that an officer who refused to obey the laws does not stand for the state within the meaning of the Federal Constitution. It was also asserted by the appellee that the depositors' guaranty fund was not under the executive and legislative control of the state and cannot be used by either for any purposes whatever, but can be used solely for the purposes of paying depositors of failed banks. The court then goes on to state that "where the state should vest the title to the fund for the purpose of its administration was

immaterial to the essence of the power to create the fund. Whether the state should commit it to the mere ministerial administration of the Bank Commissioner and Banking Board, and subject them to controversies with depositors, or draw around them the circle of its immunity, was a matter within its competency to determine, and we are brought to the question of interpretation — which has the state done?" The court then goes on to state that under the law the Banking Board is composed of the Bank Commissioner and three other persons, and that the board shall have supervision and control of the depositors' guaranty fund, and shall have power to adopt all necessary rules and regulations not inconsistent with law for the management and administration of the fund. The fund is created by levying against the capital stock of each and every bank organized and existing under the laws of the state, by an annual assessment, the fund to be used solely for the purpose of liquidating deposits of failed banks and retiring warrants provided for in the act, and if there be a deficiency, depositors' guaranty fund warrants may be issued, and an additional levy made against the member banks for the purpose of paying these certificates. In holding that it was an action against the state, the court said:

"There is strength in the contentions and we are not insensible to it, but there may be more complexity in fulfilling the scheme of the statute than the language of counsel exhibits, and it may be embarrassed

if not defeated by subjecting the Banking Board to incessant judicial inquiries of its administration. We certainly cannot assume that it will not do its duty and provide the ultimate payment of all depositors. To this result the state makes itself an active agent. It is given a lien upon the assets of insolvent banks and upon all liabilities against their stockholders, officers, directors, and against other persons, which may be enforced by the state for the benefit of the fund which its law has created."

The analogy between the accident fund here involved and the state guaranty fund involved in the *Lankford* case, *supra,* may readily be seen. The accident fund is composed of premiums levied by the state in the nature of a tax by virtue of its police power for a specific purpose, namely, paying injured workmen and their dependents for injuries, and in case of any deficiency in any particular class in the accident fund, an additional levy may be made by the state for the purpose of taking care of the deficiency, and it is submitted that the State of Washington has as much title to the accident fund here involved as the State of Oklahoma had to the state guaranty fund involved in the *Lankford* case.

In the case of *Smith v. Reeves,* 178 U. S. 436, 44 L. ed. 1140, it was held that an action against the State Treasurer in his official capacity, is in substance an action against the state itself. The court observes at page 438:

"It is quite true the state has consented that its treasurer may be sued by any party who insists that taxes have been illegally exacted from him under

assessments made by the State Board of Equalization. But we think that it has not consented to be sued except in one of its own courts. This is not expressly declared in the statute, but such, we think, is its meaning. The requirement that the aggrieved taxpayer shall give notice of his suit to the comptroller, and the provision that the treasurer may at the time he demurs or answers 'demand that the action be tried in the Superior Court of the County of Sacramento,' indicates that the state contemplated proceedings to be instituted and carried to a conclusion only in its own judicial tribunals. If a Circuit Court of the United States can take cognizance of an action of this character, the right given to the treasurer by the local statute to have the case tried in the Superior Court of Sacramento County would be of no value, for, as the jurisdiction and authority of a Circuit Court of the United States depends upon the Constitution and laws of the United States, it could not refuse to take cognizance of the case if rightfully commenced in it, and to proceed to final decree, nor could it, merely in obedience to the laws of the state, transfer it to a state court upon the demand of the State Treasurer. A Federal Court can neither take nor surrender jurisdiction except pursuant to the Constitution and laws of the United States."

In the case of *Title Guaranty & Surety Co. v. Guernsey,* 205 Fed. 91, a case in the same district in which this action was filed, in a decision by Judge Cushman, it was held that a suit against state officers to enjoin them from paying over money of the state in their hands due to a contractor and enforce a lien thereon is a suit against the state and not within the jurisdiction of the Federal Court. In the case of *Carolina Glass Co. v. Murray,* it was held that a suit against the members of the State Dispensary Com-

mission of South Carolina for the recovery of money for supplies furnished was a suit against the state. See, also to the same effect, *Murray v. Wilson Distilling Co.,* 213 U. S. 151, 53 L. ed. 742.

It would seem to be the general rule that any suit against a state official which calls for the payment of state funds is held to be a suit against the state. This action, therefore, being an original action and calling for the payment of money by the State Treasurer from the public treasury, is a suit against the State of Washington, and therefore can only be instituted as an original proceeding in the Supreme Court of the United States.

II.

Section 17 of the Trading With the Enemy Act Does Not Repeal Section 233 of the Judicial Code.

(a) The Trading with the Enemy Act does not apply to a state.

The Trading with the Enemy Act was enacted as a war measure for the purpose of restraining persons owing money to an alien enemy from turning such moneys over to an alien enemy, and thus give aid and comfort to a country and its inhabitants waging war against this country. In determining the intent of Congress in passing this act, it is submitted that Congress had no apprehension that one of the component states of this Union would give financial aid to alien enemies, and this is strengthened by the fact that in

defining the word "person," the term "state" is not used, but rather the vague term "body politic," which counsel for the plaintiff strenuously contends includes a state. The term "person," in section 2, subdivision (c) (Fed. Stat. Ann., 1918 Supp., p. 848) of the Trading with the Enemy Act, is defined as follows:

> "The word 'person,' as used herein, shall be deemed to mean an individual, partnership, association, company, or other unincorporated body of individuals, or corporation or body politic."

Counsel devotes considerable space in his brief in an effort to show that the term "body politic" in that section must be intended to include a state. Before proceeding with our argument on this question, we desire to call the court's attention to the fact that section 233 of the Judicial Code provides that the United States Supreme Court shall have exclusive jurisdiction of an action against a state, whereas section 17 of the Trading with the Enemy Act provides, in substance, that the District Courts of the United States shall have jurisdiction to make and enter all such rules as to notice and otherwise and to issue such process as may be necessary and proper to enforce the provisions of this act. While a number of courts have had occasion to construe the term "body politic," in connection with particular statutes, it has never been construed in any court in such a manner as to hold that it gives an inferior Federal Court jurisdiction over the state in its sovereign capacity

in an action brought in such inferior court against the state. The phrase "body politic" has a very wide and all-embrasive meaning when used in a general sense, and the courts have construed it to include every imaginable political corporate entity from an institution of learning—*School Board v. Meredith,* 71 So. 209—to the United States of America in the citation in counsel's brief on page 16. Incidentally, we might say that Chief Justice Marshall's definition of the United States as a body politic and corporate was in a general sense, and not for the purpose of construing a statute in which the term "body politic" had been used.

If it were not for other constitutional and statutory provisions, the term is unquestionably broad enough to include the state, but inasmuch as it is a general term which includes all possible bodies politic and corporate within the United States, and would therefore include drainage districts, irrigation districts, towns, cities and numerous other political subdivisions, as to all of which there is no constitutional or statutory inhibitions to prevent jurisdiction of the court attaching while in the case of a state there are such constitutional and statutory prohibitions, the intention of Congress to repeal such provisions by the use of a term of such general and indeterminate significance, and bring a sovereign state within the jurisdiction of the inferior Federal Courts must be plainly apparent. If section 233 of the Judicial

Code, which gives the United States Supreme Court exclusive jurisdiction of an action against the state is repealed by the Trading with the Enemy Act, it is repealed by implication and by virtue of a construction to the effect that a state is, in fact, a body politic. It is submitted that if such a repeal were intended or had actually taken place, that Congress would have used the word "state" and not the loose and vague term "body politic."

(b) Intention to repeal section 233, Judicial Code, must be plainly apparent in view of special dignity accorded a state by Federal Courts.

The first Congress in the Act of September 24, 1789, chapter 20, section 13, 1 Stat. at L., 80, provided as follows:

"The Supreme Court shall have exclusive jurisdiction of all controversies of a civil nature where a state is a party, except between a state and its citizens, or between a state and citizens of other states or aliens, in which latter cases it shall have original but not exclusive jurisdiction."

This provision is now incorporated in section 233 of the Judicial Code in the following language:

"The Supreme Court shall have exclusive jurisdiction of all controversies of a civil nature where a state is a party, except between a state and its citizens, or between a state and citizens of other states, or aliens, in which latter cases it shall have original, but not exclusive, jurisdiction. And it shall have exclusively all such jurisdiction of suits or proceedings against ambassadors or other public ministers, or their domestics or domestic servants, as a court of

law can have consistently with the law of nations; and original, but not exclusive, jurisdiction, of all suits brought by ambassadors, or other public ministers, or in which a consul or vice consul is a party."

This provision for exclusive jurisdiction of the Supreme Court of the United States in actions against the state has remained the supreme law of the land for 134 years.

It has been held under this section that a state, if it sees fit, may submit to the jurisdiction of the inferior courts, and the state, as plaintiff, may therefore select such court as it may see fit, but there has never been a case, so far as we have been able to discover, where any court has held that the state can be sued in its sovereign capacity, without its consent in any court except the United States Supreme Court. The courts of the United States have always been scrupulously careful in their recognition of the respect due the dignity of a sovereign state, and it was deemed incompatible with such dignity to compel a sovereign state to submit unwillingly to the jurisdiction of any court of less solemn power than the Supreme Court of the land.

"That a Circuit Court of the United States has not jurisdiction, under existing statutes, of a suit by the United States against a state, is clear; for by the Revised Statutes it is declared—as was done by the Judiciary Act of 1789—that 'the Supreme Court shall have exclusive jurisdiction of all controversies of a civil nature where a state is a party, except between a state and its citizens, or between a state and citizens of other states or aliens, in which latter cases

it shall have original, but not exclusive, jurisdiction.' Rev. Stat. sec. 687; Act of September 24, 1789, c. 20, sec. 13; 1 Stat. 80. *Such exclusive jurisdiction was given to this court, because it best comported with the dignity of a state, that a case in which it was a party should be determined in the highest, rather than in a subordinate judicial tribunal of the nation.* Why then may not this court take original cognizance of the present suit involving a question of boundary between a territory of the United States and a state?" *U. S. v. Texas,* 143 U. S. 621, 36 L. ed. 285. (Italics ours.)

This same thought is also embodied in the case of *Ames v. Kansas,* 111 U. S. 449, 464, 28 L. ed. 482, in the following language:

"It thus appears that the first Congress, in which were many who had been leading and influential members of the convention, and who were familiar with the discussions that preceded the adoption of the Constitution by the states and with the objections urged against it, did not understand that the original jurisdiction vested in the Supreme Court was necessarily exclusive. That jurisdiction included all cases affecting ambassadors, other public ministers and consuls, and those in which a state was a party. The evident purpose was to open and keep open the highest court of the nation for the determination, in the first instance, of suits involving a state or a diplomatic or commercial representative of a foreign government. So much was due to the rank and dignity of those for whom the provision was made; but to compel a state to resort to this one tribunal for the redress of all its grievances, or to deprive an ambassador, public minister or consul of the privilege of suing in any court he chose having jurisdiction of the parties and the subject matter of his action,

would be, in many cases, to convert what was intended as a favor into a burden.

* * * * * * * * *

"With respect to states, it was provided that the jurisdiction of the Supreme Court should be exclusive in all controversies of a civil nature where a state was a party, except between a state and its citizens, and except also, between a state and citizens of other states or aliens; in which latter case its jurisdiction should be original but not exclusive. Thus the original jurisdiction of the Supreme Court was made concurrent with any other court to which jurisdiction might be given in suits between a state and citizens of other states or aliens. No jurisdiction was given in such cases to any other court of the United States, *and the practical effect of the enactment was, therefore, to give the Supreme Court exclusive original jurisdiction in suits against a state begun without its consent,* and to allow the state to sue for itself in any tribunal that could entertain its case. In this way *states,* ambassadors and public ministers *were protected from the compulsory process of any court other than one suited to their high positions,* but were left free to seek redress for their own grievances in any court that had the requisite jurisdiction. No limits were set on their powers of choice in this particular. This, of course, did not prevent a state from allowing itself to be sued in its own courts or elsewhere in any way or to any extent it chose." (Italics ours.)

The recognition accorded state sovereignty is to be found in many different lines of decisions of the Supreme Court of the United States. One familiar example is the requirement in rate cases that state remedies must be first exhausted before recourse may be had to the Federal Courts, under the rule of comity

and convenience laid down in the case of *Prentis v. Atlantic Coast Line,* 211 U. S. 210, and followed in numerous later cases.

It is evident that a statute relative to the exclusive jurisdiction of the Supreme Court of the United States which has been observed for one hundred and thirty-four years is not to be entirely set aside or disregarded, nor can the intention be imputed to Congress to repeal such a provision in the Trading with the Enemy Act unless the intention clearly appears. As set forth above, the only possible ground to base such a supposition upon is that a state is to be included among the bodies politic referred to in the Trading with the Enemy Act.

(c) Repeals by implication not favored.

Section 17 of the Trading with the Enemy Act reads as follows:

"That the District Courts of the United States are hereby given jurisdiction to make and enter all such rules as to notice and otherwise, and all such orders and decrees, and to issue such process as may be necessary and proper in the premises to enforce the provisions of this act, with a right of appeal from the final order or decree of such court as provided in sections one hundred and twenty-eight and two hundred and thirty-eight of the Act of March third, nineteen hundred and eleven, entitled 'An act to codify, revise, and amend the laws relating to the judiciary'."

The Trading with the Enemy Act is an act complete within itself and contains no direct repeal of any previous legislation, and if there be a repeal of

section 233 of the Judicial Code, it must be by implication.

It is a rule observed, we believe, by all courts that repeals by implication are not favored, and if two acts apparently in conflict may be reconciled, such reconciliation will be effected rather than to hold that one act repeals the other. In the present case reconciliation is very easy. The term "body politic" being of such general significance, can be easily applied to all bodies politic except the state, and by reason of the long standing law upon the subject of jurisdiction over the state, it can be properly concluded that Congress did not intend to confer jurisdiction over the state upon the District Court. We do not dispute the power of Congress to confer such jurisdiction under its war powers, but contend that even under a war act the intention to overthrow a provision of such importance and one so long recognized and observed by our courts, must be plainly apparent and not inferred from general language. The rule relative to repeals by implication is well stated in Lewis' Sutherland on Statutory Construction, Vol. 1, page 247, as follows:

"When some office or function can, by fair construction, be assigned to both acts, and they confer different powers to be exercised for different purposes, both must stand, though they were designed to operate upon the same general subject * * *. The earliest statute continues in force unless the two are clearly inconsistent with, and repugnant to each other, or when in the latter statute some express

notice is taken of the former plainly indicating an intention to repeal it, and where two acts are seemingly repugnant they should, if possible, be so construed that the latter may not operate as a repeal of the former by implication."

The same rule is given in every text book on interpretation of statutes and innumerable cases cited in support thereof. We will not burden this court with citations of such a familiar rule other than to call their attention to the case of *United States v. Barnes,* 222 U. S. 513, 520, 56 L. ed. 291, 293, where the court says:

"Much of our national legislation is embodied in codes, or systematic collections of general rules, each dealing in a comprehensive way with some general subject, such as the customs, internal revenue, public lands, Indians, and patents for inventions; and it is the settled rule of decision in this court that where there is subsequent legislation upon such a subject, it carries with it an implication that the general rules are not superseded, but are to be applied in its enforcement, save as the contrary clearly appears. Thus, in *Wood v. United States,* 16 Pet. 342, 363, 10 L. ed. 987, 995, where a question arose as to what effect should be given a general provision of an early customs law in view of a later enactment upon that subject, it was said: 'And it may be added that, in the interpretation of all laws for the collection of revenue, whose provisions are often very complicated and numerous to guard against frauds by importers, it would be a strong ground to assert that the main provisions of any such laws sedulously introduced to meet the case of a palpable fraud should be deemed repealed, merely because in subsequent laws other powers and authorities are given to the customhouse officers, and other modes of proceeding are allowed

to be had by them before the goods have passed from their custody, in order to ascertain whether there has been any fraud attempted upon the government. The more natural, if not the necessary, inference in all such cases is, that the Legislature intend the new laws to be auxiliary to and in aid of the purposes of the old law, even when some of the cases provided for may equally be within the reach of each. There certainly, under such circumstances, ought to be a manifest and total repugnancy in the provisions to lead to the conclusion that the latter laws abrogated, and were designated to abrogate, the former'."

The provisions regarding the jurisdiction and proceedings of the Federal Courts have been for many years embodied in a judicial code, and the foregoing statement of the court is quite pertinent when any contention is made that a provision of the judicial code relative to jurisdiction of the Supreme Court of the United States has been changed by implication in any statute.

In view of the fact that section 233 of the Judicial Code expressly states that the Supreme Court of the United States shall have exclusive jurisdiction in actions against the state, and that the Trading with the Enemy Act only provides that the District Courts shall have jurisdiction of actions instituted by the Alien Property Custodian against persons, including a body politic, and does not state that the District Courts shall have jurisdiction of actions against a state, it is submitted that there has been no repeal by implication, which repeals are not favored in law.

Nor is there such a direct conflict between the two statutes that one must fail if both be given effect.

Section 2, Article III, of the Constitution of the United States reads, in part, as follows:

"In all cases affecting ambassadors, other public ministers and consuls, and those in which a state shall be party, the Supreme Court shall have original jurisdiction. In all other cases before mentioned, the Supreme Court shall have appellate jurisdiction, both as to law and fact, with such exceptions and under such regulations as the Congress shall make. * * *"

It will thus be noted that the Constitution states that where a state is a party, the Supreme Court of the United States shall have original jurisdiction, whereas, section 233 of the Judicial Code, states that in civil actions in which a state is a party, the Supreme Court shall have exclusive jurisdiction. In the earlier cases some claim was made that original jurisdiction as used in the Constitution amounted, in fact, to exclusive jurisdiction, but this contention was finally refuted by the courts in cases in which a state was the plaintiff. Great reliance is placed by counsel for the plaintiff on some of the cases holding to this effect.

The case of *Cohens v. Virginia,* 6 Wheat. 264, is in no way applicable, as that was the first case which held that where the state was a plaintiff, a writ of error would lie to the Supreme Court of the United States from a decision of the highest state tribunal. In so holding the court said:

"The Constitution declares that in cases where a state is a party, the Supreme Court shall have original jurisdiction, but does not say that its appellate jurisdiction shall not be exercised in cases where from their nature appellate jurisdiction is given whether a state be or be not a party. It may be conceded that where the case is of such a nature as to admit of its originating in the Supreme Court, it ought to originate there, but where from its nature it cannot originate in that court these words ought not to be so construed as to require it."

In that case the state was a party plaintiff and the constitutional provision alone was considered which stated that the Supreme Court had original jurisdiction, but that in a proper case where the state was a plaintiff it might also exercise appellate jurisdiction. In the case of *Bors v. Preston,* 111 U. S. 252, it appeared that one Preston sued Bors, who was a consul for the Kingdoms of Norway and Sweden, in the Circuit Court of the United States. The question was raised as to the jurisdiction of this court. The constitutional provision above quoted states that the Supreme Court of the United States shall have original jurisdiction in actions in which a consul is a party. Section 233 of the Judicial Code also provides that the United States Supreme Court shall have original, but not exclusive, jurisdiction of actions in which a consul was a party. It was there held that although the Constitution vested the Supreme Court with original jurisdiction in cases affecting consuls, it was competent for Congress to confer concurrent jurisdiction in those cases upon

such inferior courts as might by law be established. That case is obviously not in point by reason of the fact that Congress has never enacted any legislation stating that the Supreme Court of the United States shall have exclusive jurisdiction in actions where a consul is a party, as they have done in section 233 of the Judicial Code, in cases where a state is a party.

Neither is the case of *Ames v. Kansas,* 111 U. S. 449, in point, as that also was an action in which a state was not a defendant, but a party plaintiff. In holding that there was a vital distinction in cases where the state was a defendant, the court said:

"No jurisdiction was given in such cases to any other court of the United States, and the practical effect of the enactment was therefore to give the Supreme Court exclusive original jurisdiction in suits against the state begun without its consent, and to allow the state to sue for itself in any tribunal that could entertain its case."

III.

This Action is Not Ancillary to the Case of Miller v. Clifford, 288 Fed. 537.

In support of a contrary conclusion, counsel for plaintiff cites one case, *Gunter v. Atlantic Coast Line Railway Co.,* 200 U. S. 273, 50 L. ed. 478. The proper rule governing this proceeding, however, is the following:

"Ancillary nature of proceeding. Jurisdiction will not be entertained of suits or proceedings which are not properly ancillary to the original one, unless they are otherwise within the original jurisdiction of

the court, but in order that a Federal Court may have jurisdiction of a suit or other proceeding as dependent, a dependent cause of action is indispensable. * * * After the determination of the original cause, jurisdiction will not be extended to other questions and issues raised by a supplemental bill filed after such determination." 25 C. J. 698. *Pell v. McCabe,* 250 U. S. 573, 63 L. ed. 1147; *Stillman v. Combe,* 197 U. S. 436, 49 L. ed. 822; *H. C. Cook Co. v. Beecher,* 217 U. S. 497, 54 L. ed. 855; *Raphael v. Trask,* 194 U. S. 272, 48 L. ed. 973; *Christmas v. Russell's Executors,* 14 Wall. 69, 20 L. ed. 762; *G. & C. Merriam Co. v. Saalfield,* 241 U. S. 22, 60 L. ed. 868; *Supreme Tribe of Ben Hur v. Cobble,* 264 Fed. 247; *Montgomery v. McDermott,* 103 Fed. 801; *Woerheide v. H. W. Johns-Manville Co.,* 199 Fed. 535; *Central Trust Co. v. Chicago R. I. & P. Railway Co.,* 224 Fed. 706; *Anglo-Florida Phosphate Co. v. McKibbon,* 65 Fed. 529; *Winter v. Swinburne,* 8 Fed. 49.

We believe that this case falls clearly within the foregoing rule and citations and that this is not an action ancillary to the former case of *Clifford v. Miller, supra.* A comparison of the subject matter involved in that suit, the relief sought and the defendant therein, with the subject matter, relief and defendant in this action will show clearly that the two proceedings are entirely separate and distinct and that this action is an original action.

The case of *Miller v. Clifford,* as it was entitled in the District Court was a suit in equity for the sole purpose of obtaining possession of certain warrants and compelling the issuance of certain vouchers and to obtain possession of such vouchers when issued. It was directed against the Superintendent of the

Department of Labor and Industries of the State of Washington and the Supervisor of Industrial Insurance of the said department and state. As expressly indicated in the opinion in the case of *Clifford v. Miller, supra,* no relief was sought against the state and no attempt made to administer funds in the public treasury. After the final decree was entered in that suit the vouchers involved therein were issued by the Department of Labor and Industries and such vouchers and warrants were delivered to the Alien Property Custodian. Upon the delivery of these documents full relief sought by that suit had been obtained and the matter was finally determined. No further action was required thereunder by either the Alien Property Custodian or the defendant in that suit. That suit did not involve the validity of such vouchers or warrants, but the sole subject matter of the litigation was the possession of these papers.

The present proceeding is an action at law in the form of mandamus to obtain funds from the public treasury of the State of Washington. The defendant in this action is the State Treasurer of the State of Washington. He was not a party to the former suit and had no opportunity to contest the legality and validity of the warrants involved in that suit. We think that after an examination of the foregoing cases and a comparison of the equity suit of *Clifford v. Miller* and this law action of *Miller v. Babcock,* the conclusion cannot be escaped that the present action

is not ancillary to the former, but must be considered an independent original proceeding in the District Court.

We do not think that anything can be found in the case of *Gunter v. Atlantic Coast Line, supra,* which is contrary to the rule above set forth, while there is much in that case, we think, adverse to counsel's contention. The *Gunter* case was the outgrowth of the earlier case of *Humphrey v. Pegues,* 16 Wall. 244, 21 L. ed. 326, decided by the Supreme Court of the United States in 1873. In the *Pegues* case a permanent injunction was granted to restrain the county treasurers of certain counties in South Carolina from assessing and collecting taxes from certain railway companies. An examination of that case will show that no question of jurisdiction was raised, nor any question that the suit was against the state of South Carolina. The injunction thus granted was observed and no taxes were attempted to be collected from the railway companies for twenty-five years. Then the State of South Carolina, by legislative action, attempted to authorize such taxation and the county officials endeavored to collect from the Atlantic Coast Line Railway Company, the successor in interest of the companies involved in the *Pegues* case, and the railway company took steps to prevent the assessment and collection of such taxes. Although this proceeding was more than twenty-five years after the *Pegues* case, we call attention to the follow-

ing statement in the *Gunter* case, 200 U. S., page 281, 50 L. ed. 483:

"The petition which initiated the proceeding was filed as ancillary to the original *Pegues* case, and was entitled and numbered as that cause."

Counsel in this case has not followed such practice, but has given this action a new title and it has been docketed under a new number. Furthermore, counsel has not in this action set forth the decree in the former action, but has only alleged in his petition certain erroneous conclusions of law as to the effect of the decree in the former suit.

Although in the *Pegues* case the jurisdictional question was not raised, the Supreme Court in the *Gunter* case by an elaborate train of reasoning shows that in the *Pegues* case the State of South Carolina was the real party in interest and waived any objections that might have been raised to the jurisdiction, and jurisdiction having attached in that original proceeding would be retained in the ancillary proceeding, although that also was against the state as the real party in interest. The court says, on page 292, 200 U. S., and page 487, 50 L. ed.:

"None of the prohibitions, therefore, of the amendment or of the statute relate to the power of a Federal court to administer relief in causes where jurisdiction as to a state and its officers has been acquired as a result of the voluntary action of the state in submitting its rights to judicial determination. To confound the two classes of cases is but to overlook the distinction which exists between the power of a court to deal with a subject over which it

has jurisdiction, and its want of authority to entertain a controversy as to which jurisdiction is not possessed. From this it follows that, as in the *Pegues* case, the court had acquired jurisdiction, with the assent of the State of South Carolina, to determine as to it the controversy presented in that case, the right of the court to administer relief—to make its decree effective—cannot be measured by constitutional or statutory provisions relating to original proceedings where jurisdiction over the controversy did not obtain." (Italics ours.)

In the case of *Clifford v. Miller,* the state never consented to the jurisdiction, but was overruled, the Circuit Court holding that the state was not a party in that suit. The state does not consent to jurisdiction in this case, and for the reasons indicated, holds that this is an original action and not an ancillary proceeding and the situation is therefore entirely different from the situation in the *Gunter* case.

As stated above, the State Treasurer was not a party to the former suit, and therefore had no opportunity to contest the validity of the warrants involved in this action. The State Treasurer may lawfully question the legality of the warrants. *State ex rel. Publishing Co. v. Lindsley,* 3 Wash. 125; *Carlile v. Hurd,* 3 Colo. App. 11, 31 Pac. 952; *Commercial & Farmers Bank v. Worth,* 23 S. E. 160; *Shattuck v. Kincaid,* 31 Oregon 379, 49 Pac. 758; *Gibson v. Kay,* 68 Oregon 589, 137 Pac. 864.

State warrants are not negotiable in the sense of excluding inquiry into the legality of their issuance

or the excluding of defenses thereto. *Bardsley v. Sternberg,* 17 Wash. 243, 49 Pac. 499; *West Philadelphia Title & Trust Co. v. Olympia,* 19 Wash. 159, 52 Pac. 1015; *State ex rel. Ackerman v. Meath,* 87 Wash. 659, 152 Pac. 536.

As stated in the case of *Miller v. Clifford, supra*:

"But as already stated, neither the state nor its funds are affected by the decree in the remotest way, and no attempt is made to control the judgment or discretion of state officers."

The decree in that case simply ordered the defendants to turn over to the Alien Property Custodian certain warrants in his possession and to issue a voucher for other warrants. That decree was completely complied with, which brought about a final determination of the action in that case, so that the present action must be and is an independent one. Furthermore, the parties to the two actions are not the same, as in the case of *Miller v. Clifford,* the circuit court of appeals held that the state was not a party defendant but that the officers were defendants and were wrongfully withholding possession of property in their possession to which the plaintiff was entitled. The State of Washington, in the present action, is the real defendant, and the State Treasurer the nominal defendant, so that even the parties to the action are not the same. Furthermore, in the case of *Gunter v. Atlantic Coast Line Railway Co., supra,* the real issue was not whether the second action was ancillary to the first, but whether the in-

junction issued in the first action was *res adjudicata* as to the issues involved in the second action.

IV.

The remaining portion of this brief will be directed to answering other arguments advanced by counsel for plaintiff in his brief.

We do not fully accept plaintiff's statement as to what our demurrer admitted.

"A demurrer admits allegations only of fact. It does not admit conclusions of the pleader, except when they are supported by and necessarily result from the facts stated in the pleading. It does not admit inferences of the pleader from the facts alleged, nor mere expressions of opinion, nor theories of the pleader as to the effect of the facts, nor allegations as to what will happen in the future, nor arguments." Standard Encyclopedia of Procedure, Vol. 6, page 940.

Hester v. Thompson, 35 Wash. 119, 76 Pac. 734;

McMartin v. Stevens, 37 Wash. 616, 79 Pac. 1099.

In the *Hester* case, *supra,* the plaintiff alleged in his petition for the writ of mandamus that the respondents had acted capriciously and arbitrarily in denying a permit. The court had granted a motion to quash the writ and it was contended that the demurrer admitted the truth of the allegations. The demurrer was sustained by the Supreme Court, the court saying that a demurrer admits facts alleged, but not the conclusions drawn therefrom. In the *Mc-*

Martin case, *supra,* the court held that an allegation in a complaint that the good will of the business was the chief consideration in a sale was a mere conclusion of law in view of the expressed terms of the contract, and that such conclusion was not admitted by the demurrer.

Thus, it will be noted that on page 8 of plaintiff's brief in paragraph 4 the statement is made that the warrants in question were "*unlawfully withheld.*" This is purely a conclusion of the plaintiff, as the question has never been decided by a judicial tribunal that they were unlawfully withheld. It is further stated in the same paragraph that relator "is entitled to all of the said warrants *and funds represented thereby* under the Trading with the Enemy Act, *and was awarded them* by the district court and the court of appeals. This statement, so far as it relates to the funds and the awarding of such funds, is a conclusion of the plaintiff. The decree in the case of *Miller v. Clifford,* entered by the district court in pursuance of the decision of this court in the case of *Clifford v. Miller,* 288 Fed. 537, is not a part of the plaintiff's petition, and therefore not before the court in this proceeding. It is proper to state, however, that the decree simply awarded to plaintiff and relator in this case the custody of the warrants and vouchers involved in that case and made no reference to the state funds. As stated by Judge Rudkin in the case of *Clifford v. Miller, supra*:

"No relief whatever is sought against the state and no attempt is made to control the discretion of the state executive officers or to administer funds in the public treasury * * * but as already stated, neither the state nor its funds are affected by the decree in the remotest way and no attempt is made to control the judgment or discretion of the state officer."

In view of the foregoing decision and the decree affirmed by that decision, plaintiff's statement in his petition relative to the state funds and the awarding thereof is wholly a conclusion by the plaintiff and is not admitted by the demurrer.

II.

Plaintiff in his brief maintains *the action of mandamus is recognized by both state and Federal courts as the proper remedy to compel a municipal or state officer to pay a warrant duly issued or to perform any other ministerial act.*

This statement is correct as far as it goes, but it does not apply to the situation in this case. Neither the state nor federal courts attempt by mandamus to control the discretion of state officers. The cases cited by plaintiff are all carefully selected cases involving no power of discretion on the part of the officer, or acts by officers under unconstitutional laws. Thus, in the case of the *Board of Liquidation, et al., v. McComb,* 92 U. S. 534, 23 L. ed. 623, cited by counsel, the court states:

"The objections to proceeding against state officers by mandamus or injunction are: First, that it

is in effect proceeding against the state itself; and, second, that it interferes with the official discretion vested in the officers. It is conceded that neither of these things can be done. A state, without its consent, cannot be sued by an individual, and a court cannot substitute its own discretion for that of executive officers in matters belonging to the proper jurisdiction of the latter."

Also, in the case of *Pennoyer v. McConnaughy,* 140 U. S. 1, 35 L. ed. 363, cited by counsel, the court, in considering what is a suit against the state, divided such suits into two classes as follows:

"The first class is where the suit is brought against the officers of the State, as representing the State's action and liability, thus making it, though not a party to the record, the real party against which the judgment will so operate as to compel it to specifically perform its contracts. *Re Ayers,* 123 U. S. 443 (31:216); *Louisiana v. Jumel,* 107 U. S. 711 (27:448); *Antoni v. Greenhow,* 107 U. S. 769 (27:468); *Cunningham v. Macon & B. R. Co.,* 109 U. S. 446 (27:992); *Hagood v. Southern,* 117 U. S. 52 (29:805).

"The other class is where a suit is brought against defendants who, claiming to act as officers of the state, and under the color of an unconstitutional statute commit acts of wrong and injury to the rights of property of the plaintiff acquired under a contract with the State. Such suit, whether brought to recover money or property in the hands of such defendants, unlawfully taken by them in behalf of the State, or for compensation in damages, or, in a proper case where the remedy at law is inadequate, for an injunction to prevent such wrong and injury, or for a mandamus, in a like case, to enforce upon the defendant the performance of a plain legal duty, purely ministerial, is not within the meaning of the Eleventh Amendment an action against the State.

Osborn v. Bank of United States, 22 U. S. 9 Wheat. 738 (6:204); *Davis v. Gray,* 83 U. S. 16 Wall. 203 (21:447); *Tomlinson v. Branch,* 82 U. S. 15 Wall. 460 (21:189); *Litchfield v. Webster County,* 101 U. S. 773 (25:925); *Allen v. Baltimore & O. R. Co.,* 114 U. S. 311 (29:200); *Louisiana Board of Liquidation v. McComb,* 92 U. S. 531 (23:623); *Poindexter v. Greenhow,* 114 U. S. 270 (29:185)."

In the first class the court would not issue a writ of mandamus, while in the second class of cases it might feel justified in doing so. All of the federal cases cited by counsel for plaintiff are cases which fall within the second class as thus defined, whereas it is our contention, as will be more fully set forth later, that this action is one within the first class, and therefore an action against the state in which the federal courts will not issue a writ of mandamus to attempt to control the discretion of executive officers of the state.

Counsel cites a great many statutes and cases showing under what conditions federal courts have jurisdiction. These, of course, are controlling in all cases where a state is not a party, but have no application to a case of this character where a state is a party by virtue of section 233 of the Judicial Code. We have no quarrel with counsel's argument that the Trading with the Enemy Act was a war measure and has been uniformly upheld by the federal courts.

The case of *In re Miller,* 281 Fed. 773, has no application here, as in that case it was simply held that after a demand had been made by the Alien

Property Custodian for property, that the district court had jurisdiction to enforce such a demand. In the first place, a state was not a party to that action, and in the second place, the exact procedure authorized in the *Miller* case has been carried out herein, as the Alien Property Custodian has made a demand for these warrants, which was refused, and the district court enforced such a demand by ordering the Department of Labor and Industries of the State of Washington to turn over the warrants to the Alien Property Custodian, which has been done.

In the case of *Central Union Trust Co. v. Garvan,* 254 U. S. 554, 65 L. Ed. 403, and kindred cases, the Supreme Court of the United States has held that in a possessory action for the purpose of seizing certain property, that the defendant may not raise the question that he does not owe an alien, and that the Alien Property Custodian in a possessory action may seize it for the purpose of quickly reducing it to possession, and that the issue of whether or not the person holding the property owed an alien might be litigated in a subsequent action by putting in a claim to the Alien Property Custodian in conformity with the provisions of the Trading with the Enemy Act. Such procedure has already taken place in this case, inasmuch as the Alien Property Custodian now has possession of these warrants. However, in the *Central Union Trust Company* case, *supra*, the court said:

"The present procedure gives nothing but the preliminary custody, such as would have been gained by seizure. It attaches the property to make sure that it is forthcoming if finally condemned, and does no more."

In view of this language, it would appear that the title of the Alien Property Custodian was not such as would give him the right to demand that a state officer pay such warrants until the question of whether or not the state actually owed this money to the aliens was litigated in conformity with the provisions of the Trading with the Enemy Act. If, for instance, the alien widow died, or the condition of dependency changed and in fact the state no longer owed the alien for this reason, certainly the state treasurer, upon being advised of these facts, has power to exercise discretion in paying the warrants, and it is submitted that the jurisdiction of the District Court of the United States, at least where it rests not upon diversity of citizenship but upon the fact that the controversy arises under the constitution and laws of the United States, does not extend as far as that of the state court in compelling state officers to pay moneys out of the state funds where they have discretion in the matter. Furthermore, this is an action instituted against the State Treasurer to pay moneys out of state funds by cashing warrants heretofore delivered to the Alien Property Custodian. No demand was made on the State Treas-

urer for the payment of these warrants until long subsequent to the actual declaration of peace, and such demand must be made prior to that time or it is ineffectual. *Miller v. Rouse,* 276 Fed. 715.

Some contention is also made by counsel for plaintiff that the Eleventh Amendment to the Constitution of the United States is not applicable. The Eleventh Amendment reads as follows:

"The judicial power of the United States shall not be construed to extend to any suit in law or equity commenced or prosecuted against one of the United States by citizens of another state, or by citizens or subjects of any foreign state."

We have never made any contention that the Eleventh Amendment was applicable, as we believed that this was an action instituted by the United States of America, which would render the Eleventh Amendment inapplicable. If, however, this is an action instituted by the United States of America, certainly it is an action against the state. If it is not an action against the state, and counsel takes the position that it is not but still takes the position that it is an action by the United States of America, certainly he is in an inconsistent position, for if it is not an action by the United States of America, the Eleventh Amendment is applicable and the district courts have no jurisdiction whatever.

In the concluding paragraph of plaintiff's brief, it is requested that in case the judgment of the dis-

trict court is overruled, this court should require the district court to issue a peremptory writ for the relief prayed for. When the petition for a writ of mandamus was filed, a demurrer was interposed challenging jurisdiction of the district court. In case the demurrer was overruled, the state proposed to file an answer showing that the state did not owe a large portion of the money represented by the warrants now in the possession of the Alien Property Custodian. In view of this fact and Rule 15 and of the fact that the only question decided by the district court and the only question involved in this appeal is one of jurisdiction, it is submitted that in the event the judgment of the district court is overruled, it should be ordered to overrule the demurrer and allow the defendant to answer the case on the merits.

The concluding portion of plaintiff's brief is taken up with an unwarranted attack upon the motives of the state officers in refusing to pay these warrants, which we deem so undignified as to be not worthy of an answer further than to say that the state officers at least have absolutely no interest in the outcome of this litigation and take the position squarely that they are entitled to have this matter litigated in the court which Congress, by virtue of section 233 of the Judicial Code, has said that we are entitled to have it litigated.

It is therefore respectfully submitted that the judgment of the district court should be affirmed.

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